139-278

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1178.

THE UNITED STATES, PLAINTIFF,

vs.

CLARK BREWER, BEN. FEATHERSTON, AND JAMES BODINELLI.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED MAY 27, 1890.

versy had is a question depending largely upon the construction of local law in relation to which the decisions of the Supreme Court of Iowa should control. The Supreme Court of Iowa has for many years sustained the rule followed in this case. Its chattel mortgages have generally been drawn and enforced with reference to it. In accordance with that rule the citizens of the state have dealt and will continue to deal with each other. No creditor inside and no creditor outside without a claim large enough to sue in the Federal Court could successfully contest the mortgages of defendant. This the plaintiff knew, and sought to make his position an agent to obtain an advantage over other creditors. It seems but justice that the well settled construction given by the Supreme Court of Iowa on her chattel mortgage law, should govern all persons when doing business within the state, and should control in all suits growing out of such business.

Respectfully submitted,

Henry Miller

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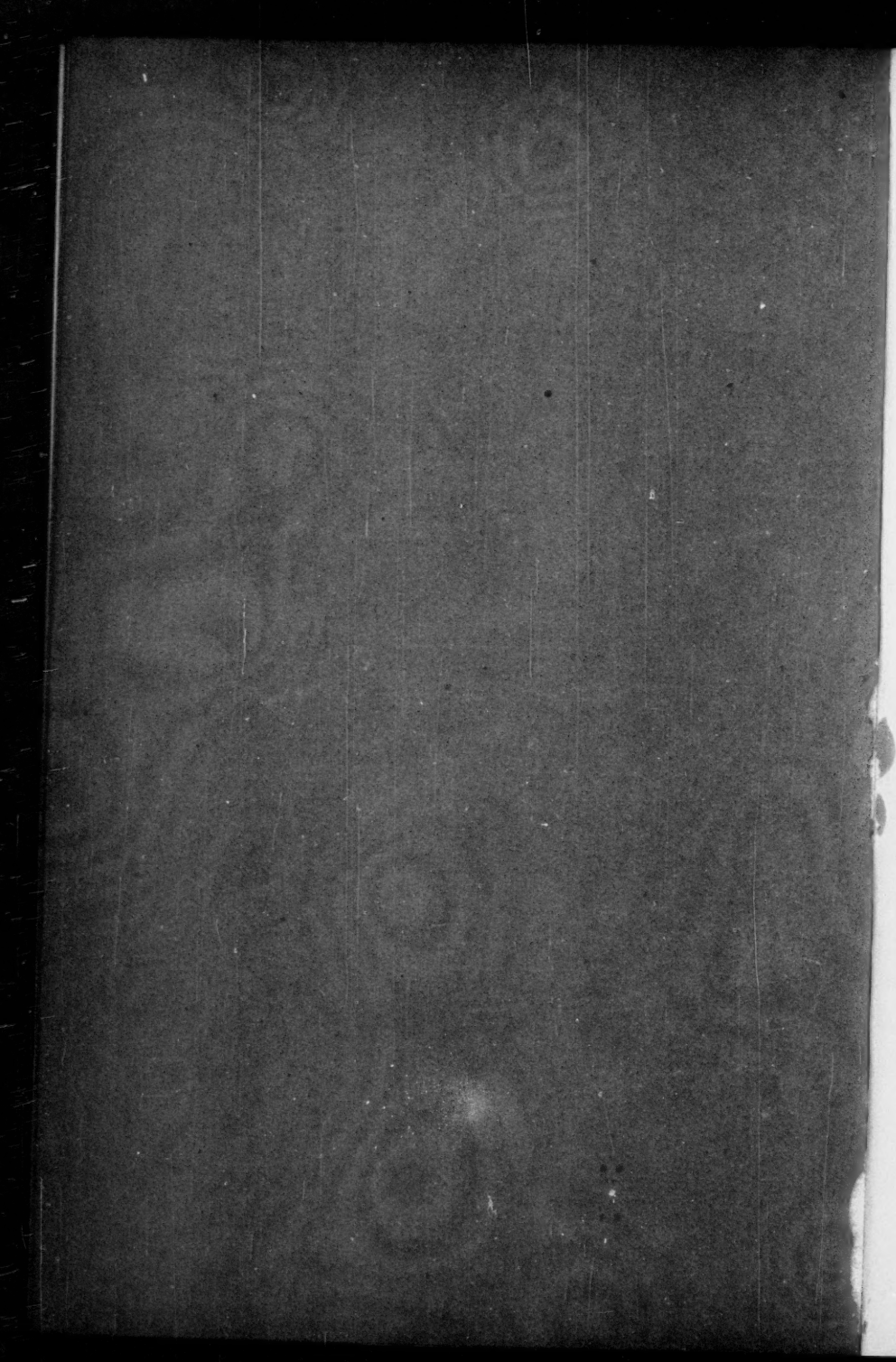
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1 *United States of America, western district of Tennessee.*

In the circuit court of the United States within and for the western division of said district, in the sixth judicial circuit of the United States, May term, A. D. 1889.

1. The grand jurors of the United States, within and for the western division of the western district of Tennessee, in said sixth judicial circuit, duly elected, empaneled, sworn, and charged to enquire within and for said division of the district aforesaid, in said circuit, upon their oaths, present that on, to wit, the sixth day of November, A. D. 1888, in the county of Shelby and State of Tennessee, and in the circuit and the western division of the district aforesaid, to wit, at the third ward of Memphis, in said county, an election for a Representative in Congress of the United States for the Tenth Congressional district of the State of Tennessee was duly held, to wit, at the southeast corner of Gayoso and Second streets, Memphis, in the fourteenth civil district of said county; that at said election Clark Brewer and Ben. Featherston were the judges thereof, and James Bodinelli was the returning officer thereof holding the said election; at which said election such Representative in Congress was then and there voted for; that it then and there thereby became and was the duty (among others) of the said judges and returning officer of said election, when the same was finished and after the polls were closed, then and there at the said place of holding the same, and at the place where the ballots were cast at said election, to open the ballot-box then and there used at said election and then and there containing the ballots cast at said election, in the presence of such of the electors at said election as might choose to attend, and to read aloud the names of the persons which should appear in each ballot in the said ballot-box so cast at said election; and that the said Clark Brewer and Ben. Featherston, judges as aforesaid, and James Bodinelli, returning officer so as aforesaid holding the said election, yeomen, unmindful of their aforesaid duty as such judges and returning officer, did then and there and within the jurisdiction of this court unlawfully neglect to perform their said duty in regard to the said election as required of them by law, by then and there and after the said election was finished and after the polls at said election were closed and before the counting of the votes cast at said election, failing to so open the said ballot-box at the place where the said election was held and to so then and there at the place last aforesaid read aloud the names of the persons which should then and there appear in each ballot in the said ballot-box, the same being the duly designated place of holding the said election, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

2. And the grand jurors aforesaid upon their oaths aforesaid do further present that on, to wit, the sixth day of November, A. D. 1888, in the county aforesaid, and in said circuit and the division of the district aforesaid at the fourth ward of Memphis, in said county, an election for a Representative in the Congress of the United States for Tenth Congressional district of the State of Tennessee was duly held, to wit, at southeast corner Gayoso and Second streets, Memphis, in said county;

2 that at said election Clark Brewer and Ben. Featherston were the judges thereof and James Bodinelli was the returning officer hold-

ing the said election, at which said election such Representative in Congress was then and there voted for; that it then and there thereby became and was the duty (among others) of the said judges and returning officer at said election when the same was finished and after the polls thereat were closed, then and there and at the place aforesaid of holding the said election, and at the place where the ballots at the said election were cast, to open the ballot-box then and there used at said election and then and there containing the ballots cast at said election, in the presence of such of the electors at said election as might choose to then and there attend, and to then and there read aloud the names of the persons which should appear in each ballot in the said ballot-box so cast at the said election; and that the said Clark Brewer and Ben. Featherston, judges as aforesaid, and said James Bodinelli, the returning officer so as aforesaid, holding the said election, yeomen, unmindful of their aforesaid duty as such judges and returning officer did then and there and within the jurisdiction of this court unlawfully refuse to perform their said duty in regard to the said election as required of them by law by then and there and after the said election was finished and after the polls at said election were closed and before the counting of the votes cast at said election, failing to so open the said ballot-box at the place where the said election was held and by then and there failing to so read aloud at the place where the said election was held, the names appearing in each ballot then and there in the said ballot-box; and by then and there and after the said election was finished and the polls thereof were closed, unlawfully removing the said ballot-box from the place where the said election was held and before the counting of the votes cast at the said election, the same being the duly designated place of holding the said election, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

3. And the grand jurors aforesaid upon their oaths aforesaid do further present that on, to wit, the day and year aforesaid, in the county aforesaid, and in said circuit and the division of the district aforesaid, at the fourth ward of said Memphis, in said county, an election for a Representative in the Congress of the United States for the Tenth Congressional district of the State of Tennessee was duly held, to wit, at southeast corner of Gayoso and Second streets, Memphis, in said county; that at said election Clark Brewer and Ben. Featherston were the judges thereof and James Bodinelli was the returning officer holding the said election at which said election such Representative in Congress was then and there voted for; that it then and there thereby became and was the duty (among others) of the said judges and returning officer at said election, when the same was finished and after the polls thereat were closed, then and there and at the place aforesaid of holding the said election and at the place where the ballots at said election were cast, to open the ballot-box then and there used at said election and then and there containing the ballots cast at said election, in the presence of such of the electors at said election as might choose to then and there attend and to then and there read aloud the names of the persons which should appear in each ballot in the said ballot-box so cast at the said election; and that the said Clark Brewer and Ben. Featherston, judges as aforesaid, and the said James Bodinelli, the returning officer, so as aforesaid holding the said election, yeomen, un-

mindful of their duty in that regard as such judges and returning officer, did then and there and within the jurisdiction of this court, unlawfully violate their said duty so imposed upon them by law in regard to the said election by then and there and after the said election was finished and after the polls at said election were closed and before the counting of the votes cast at the said election, failing to so open the said ballot-box
3 at the place where the said election was held and by then and there failing to so read aloud at the place where said election was held, the names appearing in each ballot then and there in the said ballot-box; and by then and there, and after the said election was finished and the polls thereof were closed, unlawfully removing the said ballot-box from the place where said election was held and before the counting of the votes cast at said election, the same being the duly designated place of holding the said election, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

4. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that on, to wit, the day and year aforesaid, in the county aforesaid, and in the said circuit and within the division aforesaid of the said district, at the fourth ward of Memphis, in said county, an election for a Representative in the Congress of the United States for the Tenth Congressional district of State of Tennessee was duly held, to wit, at the south-east corner of Gayoso and Second streets, Memphis, in said county; that at said election said Clark Brewer and said Ben Featherston were the judges thereof and said James Badinelli was the returning officer holding the said election, at which said election such Representative in Congress was then and there voted for; and that the said Clark Brewer and Ben Featherston, judges as aforesaid, and the said James Badinelli, the returning officer so as aforesaid holding the said election, yeomen, did then and there, and within the jurisdiction of this court, unlawfully and knowingly, and with intent to affect the said election and the result thereof, and after the said election was finished and after the polls at said election were closed, and before the counting of the votes cast at said election, remove the ballot-box used at said election, and then and there containing the ballots cast at said election, from the place aforesaid where the said election was held, the same being the duly designated place of holding the said election, such removal of the said ballot-box being unauthorized by law and contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

S. W. HAWKINS,
United States District Attorney
for said Western District of Tennessee.

4 (Indorsed:) No. 1793. Circuit court of the United States, western district of Tennessee, western division. The United States vs. Indictment for violation of duty by election officers; violation of section 5515 of the United States Revised Statutes. Clark Brewer, Ben. Featherston, James Badinelli; witnesses, J. E. Bigelow, Fred. B. Jones. Sworn to give evidence before the grand jury on this indictment this 29 day of May, A. D. 1889. R. G. Craig, foreman of the grand jury. A true bill. R. G. Craig, foreman of the grand jury. Returned into open court by the grand jury, and filed this 7th day of June, A. D. 1889. John B. Clough clerk. D. C.

5 United States of America, western division of the western district of Tennessee.

At Memphis, in the circuit court of the United States within and for the said western division of the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, began and held for its May term, A. D. 1889, at the United States court-house in the city of Memphis, in said district, on, to wit, the seventh day of June, A. D. 1889, in the following cause, to wit:

No. 1793. The United States, plaintiff, vs. Clark Brewer et al., defendant'.

This day came the district attorney and announced to the court that the grand jury were waiting to report; whereupon came the grand jury in a body into open court and presented to the court the following indictment, endorsed "A true bill," and signed by the foreman of the grand jury, viz: No. 1793; The United States vs. Clark Brewer et alios, indictment for violating the election laws, and the clerk is hereby directed to properly file and docket the said indictment according to the practice of the court, and on motion of the district attorney it is hereby ordered by the court that the usual writ of capias issue in the foregoing case, returnable to the next term of the court, and that said case be and it is hereby continued. Whereupon the following capias writ was issued:

The President of the United States to the marshal of the western district of Tennessee, greeting:

You are hereby commanded to take the body of Clark Brewer, if to be found in your district, and him safely keep, so that you have him before the judges of the circuit court of the United States, at a term of said court to be held for the western division of the district aforesaid at the court-house in the city of Memphis on the fourth Monday in November, A. D. 1889, then and there to answer the United States on a bill of indictment against him for violation of the election laws of the United States. Herein fail not, and have you then and there this writ.

Witness the Hon. Melville W. Fuller, Chief-Justice of the Supreme Court of the United States, and the seal of said circuit court, the seventh day of June, A. D. 1889, and 113th year of American Independence.

[SEAL.] JOHN B. CLOUGH,
Clerk.

Marshal's return.

This writ came to hand on the day of its issuance and was executed by arresting the said defendant and taking him before U. S. Commissioner John B. Clough, at Memphis, Tennessee, on the 26th day of June, A. D. 1889, where he gave bond for his appearance before the court.

J. W. BROWN,
U. S. Marshal.
By L. W. SMITH,
Deputy Marshal.

Returned and filed in the court on the day and date last aforesaid, at Memphis, Tennessee.

JOHN B. CLOUGH,
Clerk.

6 United States of America, western district of Tennessee, western division.

Know all men by these presents, that we, A. C. Brewer, as principal, and A. J. Harris and C. E. Smith, as sureties, acknowledge ourselves to owe and be indebted unto the United States in the sum of five hundred dollars, to be levied of our proper goods and chattels, lands and tenements, to the use of the United States, but to be void if the said principal do well and truly make his personal appearance before the circuit court of the United States for the western division of the western district of Tennessee, at the Federal court room of the Government building in the city of Memphis, Tennessee, on the fourth Monday in November next, A. D. 1889, that being the first day of the regular November term thereof, then and there to answer the United States on a charge against him for violation of the election laws of the United States, and continue in attendance at said term of said court from day to day until discharged, and abide the decision of the said court in the premises.

Witness our hands and seals this 26th day of June, A. D. 1889.

A. C. BREWER. [SEAL.]
A. J. HARRIS. [SEAL.]
C. E. SMITH. [SEAL.]

Signed, sealed, and acknowledged before me at Memphis, Tennessee, and approved by me this 26th day of June, A. D. 1889.

JOHN B. CLOUGH, [SEAL.]
Commissioner of the Circuit Courts of the United States for said Western District of Tennessee.

7 (Indorsed:) No. 1793. U. S. circuit court, western division of the western district of Tennessee. The United States vs. A. C. Brewer. Appearance bond to November term, A. D. 1889. Dated at Memphis, Tenn., June 26, A. D. 1889. Filed at Memphis, Tenn., July 9, 1889. John B. Clough, clerk. By , D. C.

8 United States of America, western division of the western district of Tennessee.

At Memphis, in the circuit court of the United States within and for the said western division of the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court at a regular term thereof, began and held for its May term, A. D. 1889, at the United States court-house in he city of Memphis, in said district, on, to wit, the seventh day of June[t] A. D. 1889, in the following cause, to wit:

No. 1793. The United States, plaintiff, vs. Ben. Featherston *et al.*, defendant.

Whereupon the following capias writ was issued:

The President of the United States, to the marshal of the western district of Tennessee, greeting:

You are hereby commanded to take the body of Ben Featherston, if to be found in your district, and him safely keep, so that you have him before

the judges of the circuit court of the United States, at a term of said court to be held for the western division of the district aforesaid, at the court-house in the city of Memphis, on the fourth Monday in November, A. D. 1889, then and there to answer the United States on a bill of indictment against him for violation of the election laws of the United States. Herein fail not, and have you then and there this writ.

Witness the Hon. Melville W. Fuller, Chief-Justice of the Supreme Court of the United States, and the seal of said circuit court, the seventh day of June, A. D. 1889, and 113th year of American Independence.

[SEAL.] JOHN B. CLOUGH,
Clerk.

Marshal's return.

This writ came to hand on the day of its issuance, and was executed by arresting the said defendant and taking him before U. S. Commissioner John B. Clough, at Memphis, Tennessee, on the 18th day of June, A. D. 1889, where he gave bond for his appearance before the court.

J. W. BROWN,
U. S. Marshal.
By L. W. SMITH,
Deputy Marshal.

Returned and filed in court on the day and date last aforesaid, at Memphis, Tennessee.

JOHN B. CLOUGH,
Clerk.

9 United States of America, western district of Tennessee, western division.

Know all men by these presents that we, B. O. Featherston, as principal, and A. Walsh and J. J. Williams, as surities, acknowledge ourselves to owe and be indebted unto the United States in the sum of five hundred dollars, to be levied of our proper goods and chattels, lands and tenements, to the use of the United States, but to be void if the said principal do well and truly make his personal appearance before the circuit court of the United States for the western division of the western district of Tennessee, at the Federal court-room of the Government building, in the city of Memphis, Tennessee, on the fourth Monday in November next, A. D. 1889, that being the first day of the regular November term thereof, then and there to answer the United States on a charge against him for violation of the election laws of the United States, and continue in attendance at said term of said court from day to day until discharged, and abide the decision of the said court in the premises.

Witness our hands and seals this 18th day of June, A. D. 1889.

B. O. FEATHERSTON. [SEAL.]
A. WALSH. [SEAL.]
J. J. WILLIAMS. [SEAL.]

Signed, sealed, and acknowledged before me, at Memphis, Tennessee, and approved by me, this 18th day of June, A. D. 1889.

JOHN B. CLOUGH,
Commissioner of the Circuit Courts of the United States for said Western District of Tennessee.

10 (Indorsed:) No. 1793. U. S. circuit court, western division of the western district of Tennessee. The United States vs. B. O. Featherston. Appearance bond, to November term, A. D. 1889. Dated at Memphis, Tenn., June 18, A. D. 1889. Filed at Memphis, Tenn., July 9, 1889. John B. Clough, clerk, by ————, D. C.

11 United States of America, western division of the western district of Tennessee.

At Memphis, in the circuit court of the United States within and for the said western division of the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, began and held for its May term, A. D. 1889, at the United States court-house, in the city of Memphis, in said district, on, to wit, the seventh day of June, A. D. 1889, in the following cause, to wit:

No. 1793. The United States, plaintiff, vs. James Bodinelli et al., defendant.

Whereupon the following capias writ was issued:

The President of the United States, to the marshal of the western district of Tennessee, greeting:

You are hereby commanded to take the body of James Bodinelli, if to be found in your district, and him safely keep, so that you have him before the judges of the circuit court of the United States, at a term of said court to be held for the western division of the district aforesaid, at the court-house, in the city of Memphis, on the fourth Monday in November, A. D. 1889, then and there to answer the United States on a bill of indictment against him for violation of the election laws of the United States. Herein fail not, and have you then and there this writ.

Witness the Hon. Melville W. Fuller, Chief-Justice of the Supreme Court of the United States, and the seal of said circuit court, the seventh day of June, A. D. 1889, and 113th year of American Independence.

JOHN B. CLOUGH,
Clerk.

Marshal's return.

This writ came to hand on the day of its issuance, and was executed by arresting the said defendant and taking him before U. S. Commissioner John B. Clough, at Memphis, Tennessee, on the 26th day of June, A. D. 1889, where he gave bond for his appearance before the court.

J. W. BROWN,
U. S. Marshal.
By L. W. SMITH,
Deputy Marshal.

Returned and filed in court on the day and date last aforesaid, at Memphis, Tennessee.

JOHN B. CLOUGH,
Clerk.

12 United States of America, western district of Tennessee, western division.

Know all men by these presents, that we, E. J. Bodinelli as principal, and B. Lanini and A. J. Harris and C. E. Smith as sureties, acknowledge ourselves to owe and be indebted unto the United States in the sum of five hundred dollars, to be levied of our proper goods and chattels, lands and tenements, to the use of the United States, but to be void if the said principal do well and truly make his personal appearance before the circuit court of the United States for the western division of the western district of Tennessee, at the Federal court-room of the Government building, in the city of Memphis, Tennessee, on the fourth Monday in November next, A. D. 1889, that being the first day of the regular November term thereof, then and there to answer the United States on a charge against him for violation of the election laws of the United States, and continue in attendance at said term of said court from day to day until discharged, and abide the decision of the said court in the premises.

Witness our hands and seals this 26th day of June, A. D. 1889.

E. J. BODINELLI. [SEAL.]
B. LANINI. [SEAL.]
A. J. HARRIS. [SEAL.]
C. E. SMITH. [SEAL.]

Signed, sealed, and acknowledged before me, at Memphis, Tennessee, and approved by me, this 26th day of June, A. D. 1889.

JOHN B. CLOUGH,
Commissioner of the Circuit Courts of the United States for said Western District of Tennessee.

13 (Indorsed:) No. 1793. U. S. circuit court, western division of the western district of Tennessee. The United States vs. E. J. Bodinelli. Appearance bond, to November term, A. D. 1889. Dated at Memphis, Tenn., June 26, A. D. 1889. Filed at Memphis, Tenn., July 9, 1889. John B. Clough, clerk. By , D. C.

14 United States of America, western division of the western district of Tennessee.

In the circuit court of the United States within and for the western division of the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D. 1889, at the United States court-house in the city of Memphis, in said district, on, to wit, the fourth day of December, A. D. 1889, in the following cause, to wit:

No. 1793. The United States, plaintiff, vs. Clark Brewer et al., defendants.

Came the district attorney on behalf of the United States and says he is unwilling to further prosecute these defendants on the fourth count of the indictment herein. It is, therefore, hereby ordered by the court that a nolle prosequi be and it is now hereby entered as to said fourth count of the said indictment.

15 Circuit court of the United States, western district of Tennessee.

THE UNITED STATES
vs.
CLARK BREWER ET AL. } No. 1793.

Demurrer filed Dec. 4, 1889.

And now come the said defendants, Clark Brewer, Ben Featherston, and James Bodinelli, in their own proper persons, into the court here, accompanied by their attorneys, and having heard the said first three counts of the said indictment read (a nolle prosequi having been duly entered as to the fourth count thereof), say that the matters and things in the said first three counts contained are not sufficient in law in manner and form as the same are above stated and set forth and that they are not bound by law to answer the same:

1. Because the matters and things stated and set forth in said three counts, in manner and form as therein contained, do not constitute offenses against the laws of the United States and do not come within the purview, true intent, and meaning of section 5515 of the Revised Statutes of the United States, nor of any act of the Congress of the United States of America.

2. Because there was no duty imposed by the laws of the State of Tennessee or by the laws of the United States or otherwise (as stated and set
16 forth in each of said three counts of said indictment) upon these defendants, as "said judges and returning officer of said election, when the same was finished and after the polls were closed, then and there and at the place of holding the same and at the place where the ballots were cast at the said election, to open the ballot-box then and there used at said election," in manner and form as the said duty is alleged in said three counts.

3. Because the first count of said indictment and the matters and things therein contained, in the manner and form as the same are therein stated and set forth, do not allege any crime or offense against the laws of the United States or a neglect to perform any duty imposed by the laws of the State of Tennessee or otherwise upon these defendants as returning officer and judges of the said election.

4. Because the matters and things contained in the second count of said indictment, in manner and form as the same are therein stated and set forth, do not allege the refusal to perform any duty imposed by the laws of the State of Tennessee or otherwise upon these defendants as judges and returning officer of the said election.

5. Because the matters and things contained in the third count of said indictment, in manner and form as the same are therein stated and
17 set forth, do not allege the violation of any duty imposed by the laws of the State of Tennessee or otherwise upon these defendants as returning officer and judges of the said election.

6. Because neither the laws of the State of Tennessee nor the laws of the United States made it the duty of these defendants, as returning officer and judges of the said election, "when the same was finished and after the polls were closed," to open the ballot-box then and there used at the said

election "at the said place of holding the same and at the place where the ballots were cast at said election," in manner and form as such duty is stated and set forth in each of said three counts of said indictment.

7. Because a removal of the ballot-box used at said election "from the place where said election was held, and before the counting of the votes cast at said election," as alleged against these defendants in the second count of said indictment, was not in law a refusal by *by* these defendants, as such returning officer and judges, to perform any duty imposed upon them by the laws of the State of Tennessee or of the United States or otherwise, in manner and form as such duty is stated and set forth in said second count of the said indictment.

8. Because the removing by these defendants, as alleged in the
18 third count of the said indictment, of the ballot-box "from the place where said election was held and before the counting of the votes cast at said election, the same being the duly designated place of holding said election," was in violation of no duty imposed by the laws of the State of Tennessee or of the United States or otherwise upon these defendants, as such returning officer and judges, as such duty is stated and set forth in the said third count of said indictment.

9. Because there is no allegation in any of the first three counts of said indictment of an intent on the part of these defendants, or any or either of them, to affect the said elections or the result thereof.

10. Because, as the duty stated and set forth in each of the first three counts of said indictment was not imposed by any law of the State of Tennessee or of the United States or otherwise upon the defendants as such judges and returning officer, the matters and things in said three counts in manner and form as therein contained do not constitute offenses against the provisions of section 5515 of the Revised Statutes of the United States, nor of any law of the United States, there being in no one of said counts any allegation of an intent on the part of these defendants to affect
19 the said election or the result thereof.

And these matters and things the said defendants are ready to verify. Wherefore for want of a sufficient indictment in this behalf the said Clark Brewer, Ben Featherston, and James Badinelli pray judgment and that by the court here they may be dismissed and discharged from the said premises in the first three counts of the said indictment specified.

TURLEY & WRIGHT,
GANTT & PATTERSON,
BEARD & CLAPP,
TAYLOR & CARROLL,
Attorneys for defendants.

Circuit court of the United States, western district of Tennessee.

THE UNITED STATES
vs.
CLARK BREWER ET AL. } No. 1793.

Joinder in Demurrer. Filed December 4, 1889.

And now comes S. W. Hawkins, district attorney, on behalf of the United States and says that the first three counts of said indictment and the matters

and things therein contained in manner and form as the same are therein stated and set forth are sufficient in law to compel the said defend-
20 ants, Clark Brewer, Ben Featherston, and James Badinelli, to answer the same; and the said district attorney is ready to verify and prove the same as the court here shall direct and award.

S. W. HAWKINS,
United States Attorney for said District.

21 United States of America, western division of the western district of Tennessee.

In the circuit court of the United States, within and for the western division of the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D. 1889, at the United States court-house, in the city of Memphis, in said district, on, to wit, the fourth day of December, A. D. 1889, in the following cause, to wit:

No. 1793. The United States, plaintiff, vs. Clark Brewer et al., defendant.

This day came again the district attorney on behalf of the United States and the said defendants, Clark Brewer, Ben. Featherston, and James Bodinelli, in their own proper persons, accompanied by their attorneys, when this case came on to be heard, and was argued by counsel before the Hon. Howell E. Jackson, circuit judge, and the Hon. E. S. Hammond, district judge presiding, upon the demurrer this day filed herein to the first three counts of the indictment in this case (a nolle prosequi having been heretofore entered herein as to the fourth count of said indictment) and upon
22 argument, the said judges, being divided in opinion on the points made by and the questions revised in the said demurrer, hereby direct the said points and questions to be certified to the Supreme Court of the United States for its decision thereon, and the same is accordingly hereby ordered by the court.

23 *Certificate of division—Filed February* 17, 1890.

Circuit court of the United States, western district of Tennessee.

THE UNITED STATES *vs.* CLARK BREWER, BEN. FEATHERSTON, JAMES Badinelli.	}	No. Upon indictment in foregoing record.

At a circuit court of the United States begun and held in the city of Memphis, Tennessee, within and for the western division of the western district of Tennessee, for its November term, A. D. 1889, the above-entitled criminal case was pending for trial, the indictment in which case is as set forth in pages 1, 2, 3, and 4 of this transcript of the record.

To the fourth count of which said indictment the district attorney of the United States for said district entered a nolle prosequi of record as set out on page 14 of this transcript.

And thereafter, on said December 4, A. D. 1889, the said de-
24 fendants filed in said case a demurrer to the first three counts of the said indictment, the same being as appears on pages 15, 16, 17, 18, and 19 of this transcript.

Whereupon on said fourth day of December, A. D. 1889, the said district attorney, on behalf of the United States, filed in said cause his joinder in the said demurrer, the same being set forth on pages 19 and 20 of this transcript.

And thereafter, on said fourth day of December, A. D. 1889, came again the district attorney, on behalf of the United States, and the said defendants, Clark Brewer, Ben. Featherston, and James Badinelli, in their own proper persons, accompanied by their attorneys, when this case came on to be heard before the said court and was argued by counsel upon the said demurrer before the Hon. Howell E. Jackson, circuit judge, and the Hon. E. S. Hammond, district judge, sitting together in the said court. And upon the argument of the said demurrer the following questions of law occurred, to wit:

1. Whether the said demurrer, so filed, to the first three counts of the indictment aforesaid ought to be sustained.

2. Whether the matters and things alleged and set forthin the first
25 three counts of said indictment constitute an offence or offences under section 5515 of the Revised Statutes of the United States or under any other law or statute of the United States.

3. Whether the laws of the State of Tennessee imposed upon said defendants as such returning officer and judges of election at the said election the duty, when the election was finished and after the polls were closed, of opening the ballot-box used at the said election at the place of holding the same, to wit, at the place where the ballots at said election were cast.

4. Whether, under the laws of the State of Tennessee, it was a violation of duty imposed upon the defendants as such judges and officer of election at the said election for said defendants, when the said election was finished and after the polls were closed, to remove the ballot-box used at said election from the place where the same was held and where the ballots were cast at said election to another place for the purpose of opening the each ballot-box and reading aloud the names of the persons appearing on each ballot, as contemplated by section 1068 of the Code of Tennessee (Milliken & Vertrus edition).

5. Whether it was the duty, under the laws of the State of Ten-
26 nessee, of the said defendants, as judges and officers of the said election, after the same was finished and after the polls at said election were closed, to open the ballot-box used at said election, to wit, at the southeast corner of Gayoso and Second streets, in Memphis, Tennessee, the same being the duly designated place of holding said election, and the place where said election was held, and to there read aloud the names of the persons appearing on each ballot cast at said election, as contemplated by said section 1068 of the Code of Tennessee.

6. Whether it was a violation of duty imposed by the laws of the State of Tennessee upon the defendants as judges and officer of said election, when the same was finished and after the polls at said election were closed and before the counting of the votes cast at said election, to remove the said ballot-box from the southeast corner of Gayoso and Second streets, in Mem-

phis, Tennessee, that being the designated place of holding said election and the place where the same was held, for the purpose of opening the said ballot-box and reading aloud the names of the persons appearing on each ballot cast at said election, as contemplated by said section 1068 of the Code of Tennessee.

27 7. Whether it was a neglect or refusal of duty imposed by the laws of the State of Tennessee upon the defendants, as judges and officer of the said election, when the same was finished and after the polls at said election were closed and before the counting of the votes cast at said election, to fail to open the ballot-box used at said election at the southeast corner of Gayoso and Second streets, in Memphis, Tennessee, that being the duly designated place of holding said election, and the place where the same was held, and to there read aloud the names of the persons appearing on each ballot cast at said election, as contemplated by said section 1068 of said Code of Tennessee.

8. Whether the first three counts of said indictment, or any of them, are bad because no one of the said counts contains an allegation that the matters and things therein respectively charged and set forth against said defendants as judges and officer of the election aforesaid were so done by them with intent to affect the said election and the result thereof.

On which said questions and on each and every of them the judges aforesaid were opposed.

Whereupon, on request of said defendants by their counsel that the said questions on which the foregoing disagreements occurred may,

28 during the said term of court, be stated under the direction of the said judges, and certified under the seal of said circuit court to the Supreme Court of the United States to be finally decided, it is ordered that the foregoing abstract of the pleadings, orders, demurrer, joinder in demurrer, and statement of the points on which the said disagreement has happened, which is made under the direction of the said judges, be certified according to the request of the said defendants by their counsel and in pursuance of the statute in such case made and provided.

HOWELL E. JACKSON,
Circuit Judge.

E. S. HAMMOND,
District Judge.

29 The United States of America, sixth judicial circuit, western district of Tennessee.

I, John B. Clough, clerk of the circuit court of the United States for the western division of the said western district of Tennessee, do hereby certify that the papers hereto attached are a full, true, perfect, and correct copy of the entire record and proceedings, as well as of the certificate of division in said court, as the same now appear of record and upon the files in my office in the following cause, to wit: No. 1793, The United States vs. Clark Brewer, Ben. Featherston, James Bodinelli.

In testimony whereof I have hereunto set my name and affixed the seal of said court, at office in the city of Memphis, Tennessee, this 26th day of March, A. D. 1890, and of the Independence of the United States the 114th year.

[SEAL.]

JOHN B. CLOUGH, *Clerk.*
———— ————, *D. C.*

(Indorsed:) No. 1793. Circuit court of the United States, western district of Tennessee. The United States vs. Clark Brewer, Ben. Featherston, James Bodinelli.

(Indorsement on cover:) No. 1178. The United States, plaintiff, vs. Clark Brewer, Ben. Featherston, and James Bodinelli. W. Tennessee, C. C. U. S. Filed May 27, 1890. Supreme Court, U. S. Clerk's office. Received May 27, 1890.

Office Supreme Court U. S.
FILED.
JAN 20 1891
JAMES H. MCKENNEY
CLERK.

In the Supreme Court of the United States

OCTOBER TERM, 1890.

THE UNITED STATES,
vs.
CLARK BREWER, BEN FEATHERSTONE, and James Bodinelli. } No. 1178.

ON A CERTIFICATE OF DIVISION BY THE JUDGES OF THE CIRCUIT COURT FOR THE WESTERN DISTRICT OF TENNESSEE.

BRIEF FOR THE UNITED STATES.

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ON A CERTIFICATE OF DIVISION BY THE JUDGES OF THE CIRCUIT COURT FOR THE WESTERN DISTRICT OF TENNESSEE.

The defendants, Brewer and Featherstone, were judges, and Bodinelli was the returning officer, at the election in the Third ward of Memphis, on the 6th day of November, 1888, the same being a Congressional election.

An indictment was found in the circuit court against these three men, said indictment being in three counts, the counts differing in this: The first charged the defendants with *neglecting* a duty alleged to have been prescribed by statute; the second charged that they *refused to perform* the duty; and the third that they *violated* a duty imposed upon them by law. The duty referred to, and under which it is claimed these officers rested, was that

they were required, at the close of the polls on election day, at the place where the election was held, to open the box and proceed to count the votes.

The indictment originally consisted of four counts, the the last of which was, however, *nollied*. The defendants demurred to each of the other three counts, the demurrer being found upon page 9 of the printed transcript. There was a joinder in demurrer by the Government. Substantially two questions were presented upon this demurrer: First, whether under the statutes of the State of Tennessee and of the United States it was the duty of the defendants at the closing of the polls to proceed *then and there* to count and make a return of the votes; second, whether it was necessary that an unlawful intent should be specifically averred in the indictment.

ASSIGNMENT OF ERROR.

The Government here assigns as error that the judges of the circuit court erred in not overruling the demurrer to each count of the indictment.

ARGUMENT.

Several sections of the statutes of Tennessee (Milliken & Vertress edition), bearing upon this question, read as follows:

> Sec. 1067. The officer or person and judges appointed to hold an election shall not proceed to or commence counting out the votes given in the election until the polls shall have been closed.
>
> Sec. 1068. When the election is finished, the returning officer and judges shall, in the presence of such of the electors as may choose to attend, open

the box and read aloud the names of the persons which shall appear in each ballot; and the clerks, at the same time, shall number the ballots, each clerk separately.

Sec. 1070. The inspectors have authority to maintain regularity and order in the balloting; to keep access to the polls free and unobstructed; to prevent all disorderly and riotous conduct during the election, and during the counting of the votes after the polls are closed; and for this purpose they are vested with all the powers of a peace officer.

Sec. 1041. The place of holding elections shall be in each civil district, at some convenient locality, to be designated by the county court at least six months before the election, and entered of record.

Sections 1049 and 1050 provide for filling the place of any officer failing to be present on the morning of election at *the place of election.*

Section 1051 prescribes the oath to be taken by the judges of election, said oath containing the following provision:

> That you will not suffer the ballot-box to be out of the presence or sight of at least two of your number until every vote is counted out.

Section 1031 provides, in case of special elections, for a special notice of the times, places, and purposes of such elections.

The title of Article VII is "Proceedings at the polls." This title includes sections 1067, 1068, and 1070.

The constitution of Tennessee, Article IV, section 3, reads as follows:

> Electors shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest or

> summons during their attendance at elections, and in going to and returning from them.

It seems to me that these provisions leave no room for doubt, that it was the legislative intention that, upon the closing of the polls, the election board should, then and there, proceed to count and make a return of the votes.

I.

In the first place, section 1041 requires that six months in advance the place shall be designated, and a record of such designation made, and that it shall be a convenient place. Convenient for what? Evidently convenient for the election board to do their work, and convenient for the electors to cast their votes, and observe the manner of such work. The fact that in 1067 the judges are forbidden to commence counting before the closing of the polls, in connection with the fact that they are commanded when the election is finished to commence such count, raises an implication that the count is to be at the place of the election. But section 1068 seems to make the matter clear.

> When the election is finished the returning officer and judges shall, *in the presence of such of the electors as may choose to attend*, open the box and read aloud the names of the persons which shall appear in each ballot, and the clerks at the same time shall number the ballots, each clerk separately.

Of what use would be the provision that this should be done in the presence of such electors as might choose to attend if the law did not require this to be done at a place of which the electors might be advised. If the election

board is not required by law to count at the place of election, then they might take the ballot box, go into a secret place, go out of the election precinct, go out of the county or out of the State, for the purpose of making the count. How utterly inconsistent would be such a proceeding with the legislative intent as expressed in section 1070, wherein it is said, "The inspectors have authority to maintain regularity and order in the balloting; to keep access to the polls free and unobstructed; to prevent all disorderly and riotous conduct during the election *and during the counting of the votes after the polls are closed*, and for this purpose they are vested with all the powers of a peace officer." Where and for how long are they vested with this power of peace officers? May they go into any county of the State and carry their police powers with them? Or are they confined in the exercise of these powers to the immediate proximity of the polls or place where the election is held or place where the count is going on?

The same idea is strongly reënforced by reference to the constitutional privilege of electors. Is it doubted that electors in attendance and watching the count, as prescribed in section 1068, would be entitled to the privilege from arrest, as prescribed in Article IV, section 3, of the Constitution? Would not such electors be, in the language of that section, "in attendance at elections," or would it be claimed that electors, chasing an election board around all over the county or State, would be in attendance upon such elections? The same sort of reasoning upon which it is claimed that this count need not be had at the place of election would excuse the board from making the count immediately after the closing of the polls;

would authorize them to adjourn for one, two, or three days, or even a longer time. Unless the count is to be then and there, no provision is made for notice to the electors of time or place so as to enable them to be present to witness the count. Unless the statute as enacted requires the count to be then and there, the election board would violate no law should they assemble secretly and make the count at any place and at any time prior to the Monday following the election, being the day prescribed for the general canvass for the county. Such a construction is wholly at variance with the provisions in section 1068, "that the count shall be in the presence of such of the electors as may choose to attend," as it is also inconsistent with the provision of section 1070, giving to the election officers police powers.

It is worthy of remark that it has been decided, and it is believed rightly decided, that excluding an elector from the count at any other place than the polling place is no crime (U. S. *vs.* Bachnelli, 37 Fed. Rep., 138). This being so, by going to an unauthorized place the election board can nullify the law requiring an open public count and commit frauds in secret *ad libitum*. The above-cited decision on an indictment of the same parties now before the court furnishes a very practical illustration of the results of their contention.

But we are not left entirely to the statutes of Tennessee. The statutes of the United States assist in arriving at a proper construction and understanding of the State statutes. And the statutes of the United States show plainly that the legislation of Congress was based upon the idea that the count follows immediately the

close of the polls and at the same place. Section 2017, Revised Statutes of the United States, authorizes and requires supervisors of elections—

> To attend at all times and places for holding elections of Representatives or Delegates in Congress, and for counting the votes cast at such election * * *; to be and remain where the ballot boxes are kept at all times after the polls are open until every vote cast at such time and place has been counted, the canvass of all the votes polled has been wholly completed, and the proper and requisite certificates or returns made.

Section 2018 requires the supervisors—

> To personally scrutinize, count, and canvass each ballot in their election district or voting precinct cast, etc.

Section 2019 reads as follows:

> The better to enable the supervisors of election to discharge their duties, they are authorized and directed, in their respective election districts or voting precincts, on the day of registration, on the day when registered voters may be marked to be challenged, and on the day of election, to take, occupy, and remain in such position, from time to time, whether before or behind the ballot boxes, as will, in their judgment, best enable them to see each person offering himself for registration or offering to vote, and as will best conduce to their scrutinizing the manner in which the registration or voting is being conducted; and at the closing of the polls for the reception of votes they are required to place themselves in such position in relation to the ballot boxes for the purpose of engaging in the work of canvassing the ballots as will enable them to fully perform the

> duties in respect to such canvass provided herein, and shall there remain until every duty in respect to such canvass, certificates, returns, and statements has been wholly completed.

Whether there were United States supervisors at the election under consideration the indictment does not show. As matter of law there might have been, as is plainly shown by section 2029.

Now, in view of the provision of section 2019, requiring the supervisors to take such position with reference to the ballot boxes during the election as will enable them to supervise the entire proceedings, and the further requirement that they *remain* in such position until the count is completed, it is certainly little better than absurd to say that the election board provided for under the State law may carry off these ballot boxes and make the count and return at some place other than that where the election has been held and of which notice has been given.

So sections 2021 and 2022 authorize and require the special deputy marshals to keep order, assist the supervisors in the discharge of their duties, and make arrests either before or after registration or voting, but nowhere except at the place of registration or voting.

Upon an examination, therefore, of the statutes of Tennessee, as well as of the United States, it seems to be too plain for argument that these election officers were required, as alleged in the indictment, then and there to open the ballot box and read the names aloud in the presence of such electors as chose to attend.

But it is said that the statutes of Tennessee do not in express terms require the count by the election board *to*

be made at the same place where the election is held; that this being a penal statute, it is to be construed strictly, and that, therefore, it will be held that the duty to make the count at that place is not imposed by the statute. The statute does not in terms forbid a change of the polling place during the election. Might such change, therefore, be lawfully made? The truth is, the words "holding elections," in section 7041, according to the general understanding and universal practice, include the counting as well as the casting and receiving votes.

Perhaps, however, the best answer to be made to that argument is found in the language of Mr. Justice Harlan in his opinion *In re* Coy, published as a note to the principal case of the same name in 127 U. S., at page 739. In that case the statutes of Indiana required that when the count was completed the inspector, or one of the judges, should take one copy of the returns and present the same on the following Thursday to the board of canvassers for the county. The charge was that Coy, with others, had conspired to induce one of these judges to deliver his copy of the returns to a third party between Tuesday and Thursday. The objection was made there, as here, that the statute did not in express terms require the inspector or judge to keep those papers in his actual custody during this intervening period, and that, therefore, his delivery of them to a third person was not a violation of a duty imposed by the statute. Judge Harlan says:

> It will be observed that the local statute does not, in express terms, require the inspector to keep those papers in his actual manual custody during the whole period intervening after they are 'deposited'

with him, and before he returns them to the board of canvassers. It is therefore contended that the surrender of them to Perkins was not a violation of any duty imposed upon the inspector and could not be deemed a crime unless done with the intent to affect in some way the result of the election for Representative in Congress; and that as it is not charged in the indictment that the alleged surrender of the election papers was with such intent, or that the alleged forgeries and alterations in fact affected the result of the election for Representative in Congress, it does not appear that any offense against the United States was committed.

In support of these positions, counsel for the prisoner invoke the familiar rule that penal statutes are to be construed strictly; that is, for the benefit of him against whom the penalty is inflicted. (Dwar. St. 634.) It is doubtful whether that rule has any application in the present case; for the statutes of Indiana, to which we have referred, merely regulate the conduct of general elections in that State and define the duties of the officers of such elections. Let it, however, be conceded, for the purposes of this case, that, in determining whether the prisoner has committed a crime, the statutes of Indiana and the statutes of the United States relating to the election of Representatives in Congress, taken as a whole, should be interpreted as penal statutes strictly, and not as remedial enactments, to be liberally construed in order to suppress the frauds and public wrongs against which they are directed. (*Taylor* v. *United States*, 3 How., 197, 210; *United States* v. *Hartwell* 6 Wall., 385).

Still the inquiry remains as to the intent with which the legislative department enacted these laws. In giving effect to the rule that penal statutes must be strictly construed, the court must not disre-

gard the kindred rule that the intention of the law maker, to be gathered from the words employed, governs in the construction of all statutes. It was said by the Supreme Court of the United States, speaking by Chief-Justice Marshall in *United States* v. *Wiltberger* (5 Wheat., 76, 95), that "though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation or in that sense in which the legislature had obviously used them, would comprehend." So, in *United States* v. *Morris* (14 Pet., 464, 475), Chief-Justice Taney, speaking for the court, said: "In expounding a penal statute the court certainly will not extend it beyond the plain meaning of its words, for it has been long and well settled that such statutes must be construed strictly. Yet the evident intention of the legislature ought not to be defeated by a forced and overstrict construction." (See also *American Fur Company* v. *United States*, 2 Pet., 358, 367.

Giving to the prisoner the full benefit of the rule of interpretation invoked in his behalf—leaning to the side of mercy where the liberty of the citizen is involved—I entertain no doubt that the statutes of Indiana, fairly construed, impose upon an inspector who receives the certificate, tally sheet, and poll list of a general election the duty of safely keeping them in his own custody until they are delivered or returned to the board of canvassers. The requirement that they shall be "deposited" with him, and that the board of canvassers of which he is *ex officio* a member shall "canvass and estimate the certificates, poll lists, and tally papers *returned by each member of said board*," is inconsistent with the idea that he may,

prior to the assembling of the board of canvassers, voluntarily surrender these important papers into the hands of others. I say important papers, because, upon examining the statutes and the decisions of the supreme court of Indiana, it will be found that, although in contested-election cases the ballots, lists of voters, and tally papers sealed up and delivered to the county clerk are primary and conclusive evidence of the result of the election (*Reynolds* v. *State*, 61 Ind., 392, 422, *et seq.*), the papers "deposited" with the inspector constitute the basis upon which rests the official declaration in the first instance of the result of all elections in the State. (*Moore* v. *Kessler*, 59 Ind., 152).

The election of members of the State legislature, governor, Representatives in Congress, and electors for President and Vice-President all rest upon the papers so deposited with inspectors. (Rev. Stat., Ind., §§ 4717, 4718, 4721, 4723, 4724, 4726–4729.) It is inconceivable that any inspector could suppose it to be consistent with his duty to part with these papers in advance of his meeting his colleagues of the board of canvassers. They are deposited with him as an officer of the law, acting under the sanction of an oath. The word "deposited" implies that the depositary must safely keep these papers in his own custody until he surrenders them to the board whose duty it is to canvass the returns and certify the result of the election. While he may not be responsible for their absolute safety in every case, he is under a solemn duty to guard them with diligence proportioned to their value and to the danger that might come to the public from their loss or mutilation. He holds them in trust for the public, and his duty to retain them in his own exclusive custody is quite as clearly defined as if the statute had so declared in

express words. If he voluntarily parts with them before they are returned to the board of canvassers they are no longer "deposited" with him. Any other construction would defeat the obvious intention of the legislature and shock the common sense of every one interpreting these statutory provisions in the light of the ordinary meaning of the words used.

It is said that the inspector would not violate his duty by depositing these papers after they were received by him in some bank for safekeeping; consequently it is contended he need not always have them in his actual manual custody. This might depend upon the mode of the deposit. If they were placed in a box in the bank vault, and he alone had access to that box, they might in such a case be regarded as in his actual custody. Other cases might be supposed in which his duty to hold the papers might not be violated by the particular mode adopted for their preservation. But no case of doubtful character is now before us. The specific charge in the indictment is that the inspector unlawfully surrendered the papers to Perkins, who had no right under the law to their custody, and that he was induced to do so by Coy in one case, and in the other case by Coy and his confederates."

The attempt in that case, as in this, was to defend upon the ground so often asserted, and as often refuted by the courts, that an implied power is no power, and an implied duty is no duty. This method of construing the Constitution of the United States has been frequently attempted, but has found little encouragement in this court. In *Ex parte* Yarbrough (110 U. S. R., 651) it was claimed that Congress had no power to pass sections 5508

and 5520 of the Revised Statutes, protecting the right of suffrage. This court says:

> If this Government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the General Government, it must have the power to protect the elections on which its existence depends from violence and corruption.
>
> If it has not this power, it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption.
>
> The proposition that it has no such power is supported by the old argument often heard, often repeated, and in this court never assented to, that when a question of the power of Congress arises the advocate of the power must be able to place his finger on words which expressly grant it. The brief of counsel before us, though directed to the authority of that body to pass criminal laws, uses the same language. Because there is no *express* power to provide for preventing violence exercised on the voter as a means of controlling his vote, no such law can be enacted. It destroys at one blow, in construing the Constitution of the United States, the doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed. This principle, in its application to the Constitution of the United States, more than to almost any other writing, is a necessity, by reason of the inherent inability to put into words all derivative powers, a difficulty which the instrument itself recognizes by conferring on Congress the authority to pass all laws necessary and proper to carry into execution the powers expressly granted and all other powers vested in the Government or any branch of it by the Constitution, Article I, section 8, clause 18.

> We know of no express authority to pass laws to punish theft or burglary of the Treasury of the United States. Is there, therefore, no power in the Congress to protect the Treasury by punishing such theft and burglary?
>
> Are the mails of the United States and the money carried in them to be left to the mercy of robbers and of thieves who may handle the mail because the Constitution contains no express words of power in Congress to enact laws for the punishment of those offences? The principle, if sound, would abolish the entire criminal jurisdiction of the courts of the United States and the laws which confer that jurisdiction.

The contention here, as in that case, in the language of that opinion destroys at one blow the doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed.

The opinion of this court *in re* Coy (supra) is not less directly in point than is the opinion of Mr. Justice Harlan; for Mr. Justice Miller, speaking for the court, says, on page 748, that it was the duty of these inspectors to take the certified lists of the voters with the returns of the judges, and safely keep them until they delivered them to the county clerk or to the board of cavassers, etc. And, again—

> It is an omission of this duty which was imposed upon these inspectors by the law of Indiana, of safely keeping these papers confided to their care, that constitutes the foundation of this proceeding.

I submit that the duty of the inspector or the judge in the Coy case, to keep in his custody and to preserve intact the returns committed to his care, is not more clearly implied in the language of the statute than is the duty of

the returning officer and judges under the Tennessee statutes, "when the election is finished to proceed" *then and there*, "in the presence of such electors as choose to attend, to open the box and read aloud the names of the persons which shall appear in each ballot."

As Mr. Justice Harlan says, it is very doubtful whether the rule that penal statutes are to be construed strictly has any application to this case. The statute of Tennessee, under consideration, is not a penal statute. The sections under consideration impose no penalties. It is a statute regulating the method of conducting elections. It is much more akin to a remedial than to a penal enactment. The statute of Tennessee simply defines the duties of these officers. It is no more a penal statute than if there were no provision of law under which a violation of these duties could be punished. Congress or a State legislature may enact a law defining any kind of property; for instance, promissory notes, or bank notes, bills of exchange, or Government notes, and by separate statutes it may be made a crime to forge, counterfeit, or steal any of these several kinds of property. The latter statute would be penal, but the statute defining the different kinds of property would be in no sense penal. So statutes prescribing the duties of any public officers are not penal, nor are they made penal by reason of the fact that other statutes are enacted making a violation of those duties criminal. Applying this principle to the case at bar, it seems to be relieved of all difficulty. All that is necessary is to give to this Tennessee statute its natural, obvious, common meaning, what would be understood by any person of ordinary in-

telligence, and the duty of these officers, as we contend for it, was plain. Of course the question whether the counting of the votes at any other place would invalidate the election is not involved. The officers may be liable to punishment and be punished for their violations of the law, and yet the election be valid. (McCrary, sec. 128.)

II.

The other objection made to this indictment is that neither count charges specific criminal intent. To that the answer is the offense is statutory, and the specific intent is no part of the offense as defined by the statute. This question was directly considered and adjudged by Mr. Justice Harlan *In re* Coy, heretofore referred to, and his observations on this point are found in 127 U. S. R., on page 736. The same question, arising in the same State, was directly adjudged in the same way, under the same statute, by Judge Hammond, in United States against Jackson (25 Fed. Rep., p. 548). So in the United States against Byaud (16 Fed. Rep., p. 376), in which the hearing was had before Judges Wallace, Benedict, and Brown, who all concurred in the opinion, it is adjudged that in case of a statutory offense, in whose definition no reference, is made either to knowledge or intent, it is necessary to allege or prove neither knowledge nor intent. In support of this last-cited decision very numerous cases, both in the English and in our State courts, are adduced in the opinion. An examination of section 5515, upon which the indictment under consideration rests, makes it entirely clear that

the offense here sought to be punished was one in which intent was no necessary ingredient. That section reads as follows:

> Every officer of an election at which any Representative or Delegate in Congress is voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any State, Territorial, district, or municipal law or authority, who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States or of any State or Territory thereof, or who violates any duty so imposed, or who knowingly does any act thereby unauthorized with intent to affect any such election or the result thereof; or who fraudulently makes any false certificate of the result of such election in regard to such Representative or Delegate, or who withholds, conceals, or destroys any certificate of record so required by law, respecting the election of any such Representative or Delegate; or who neglects or refuses to make and return such certificate as required by law; or who aids, counsels, procures, or advises any voter, person, or officer to do any act by this or any of the preceding sections made a crime, or to omit to do any duty the omission of which is by this or any of such sections made a crime, or attempts to do so, shall be punished as prescribed in section fifty-five hundred and (*ten*) (eleven).

This section consists of eight clauses, each independent of the other, and each designating a complete offense. Of these clauses in the third only knowledge or intent is made a part of the crime. As to the third clause, the reason for making knowledge or intent a part of the crime seems to be that it is so general, being directed against acts not un-

lawful but simply unauthorized, that the knowledge or intent seems to be necessary. As to the other clauses, there is no more reason for applying the requirement of intent to those which precede than to those which follow the third. The accusation here is that these election officers come within the language of the second clause; that is, that each of them was an officer "who violates any duty imposed." The statute of the State prescribed the duty, the statute of the United States prescribed the punishment for a violation of that duty, and this it does without reference to the intent. It is sufficient for the officers that the law imposes upon them an obligation to do certain acts and menaces them with a penalty for failure to do those acts. If the word "intent" were left out of the third clause a very different question would be presented. To punish a man for doing an act unauthorized by a statute, without coupling with it an averment of specific evil intent is one thing, but to punish him for failing to do what the law specifically commands is no hardship, as we have seen, and so it has been repeatedly adjudged.

In conclusion, it seems to me no laws demand a more rigid enforcement than those relating to the conduct of elections. It is a most lamentable fact, yet a fact, that upon this subject our people, especially the part of them having much to do with elections, are more demoralized than upon any other matter, either of law or morals. Men of the highest standing socially and in a business way not only wink at but encourage, defend, and even actually assist in the perpetration of the vilest crimes with reference to elections. Men who could be trusted implicitly

with any amount of money do not hesitate to steal ballots and even whole ballot boxes. Men who would shrink at the thought of forging an ordinary commercial instrument aid and abet the forging of election returns. Men who would resent with indignation a suggestion of an attempt at bribery in other matters do not hesitate to buy votes, to bribe election officers, and in every way to try by fraudulent and even violent means to defeat an honest expression of the popular will.

Usually those who are the most deeply implicated in a criminal way in such transactions have no interest or motive except political sentiment instigating their action. Generally they expect and get no offices; those who do get the benefit of such misdeeds keep out of reach of the law; and it is a disgraceful fact that public men and public journals rarely denounce such crimes except when committed in the opposite party. The truth is our people to-day are more crazy upon the subject of politics, and are more ready to perpetrate crimes in the interest of their party than were our ancestors, a few centuries ago, in the interest of what they supposed to be their religion; with this difference, that in view of the light all around us in the 19th century, we have vastly less excuse for the crimes we commit in the name of party than our ancestors had for those they committed in the name of the Church.

In view of this state of things, whenever any man, having a plain duty prescribed by law, with reference to the expression of the popular will, deliberately violates that duty, it seems to me the courts should so deal with him as that neither he nor his neighbors will soon repeat

the offense. By this it is not meant that the law shall be strained against any such offender, but it is meant that a plain, common sense construction ought to be put upon the law, and that it ought to be enforced accordingly.

W. H. H. MILLER,
Attorney-General.

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In the Supreme Court of the United States.

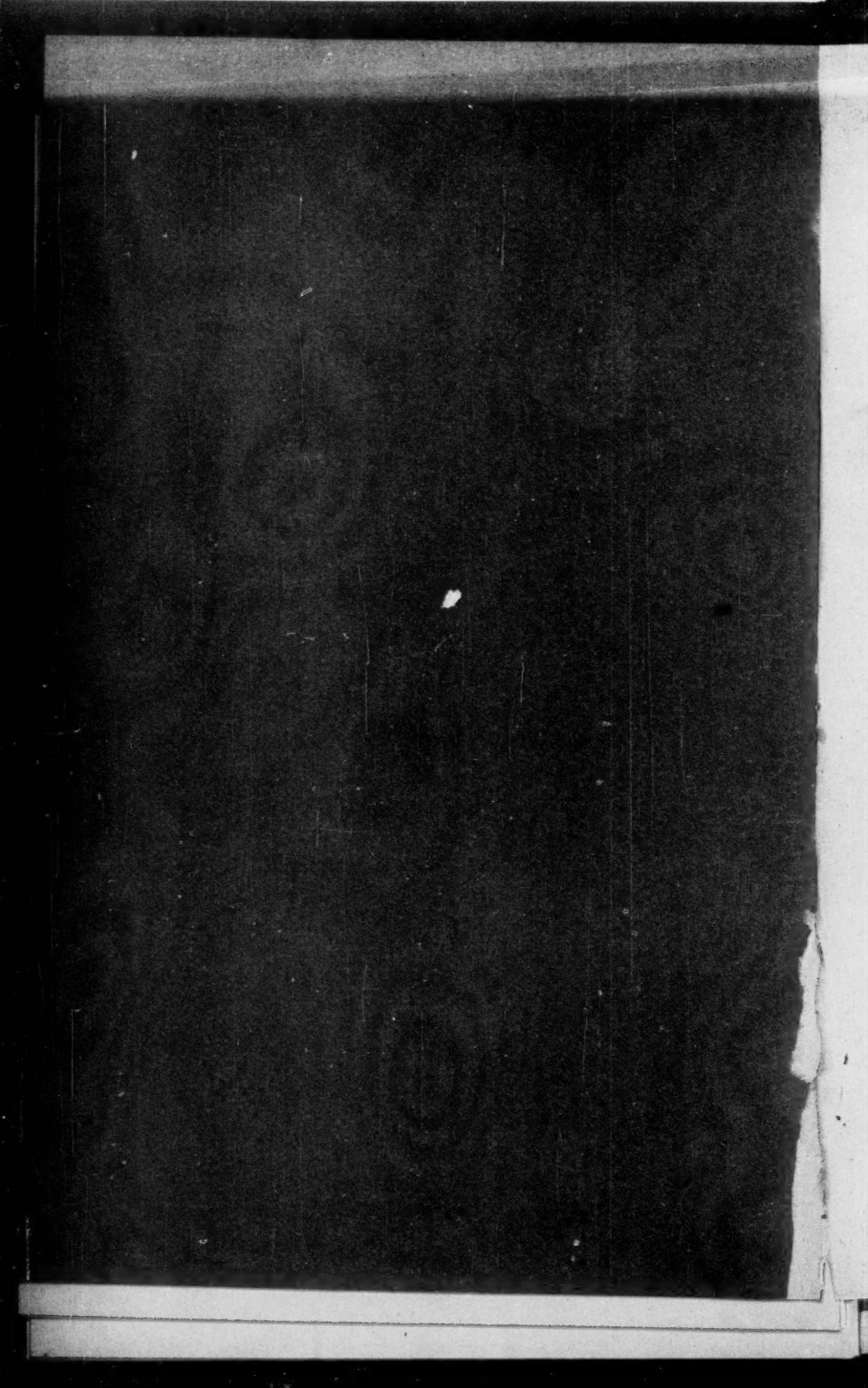
THE UNITED STATES, PLAINTIFF,

vs.

CLARK BREWER, BEN FEATHERSTONE AND JAMES BARDINELLI, DEFENDANTS.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF TENNESSEE.

TRACY PRINTING CO., MEMPHIS.



IN THE SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES, *Plaintiff*,

vs.

CLARK BREWER, BEN FEATHERSTONE AND JAMES BARDINELLI,
Defendants,

On a Certificate of Division in Opinion between the Judges of the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

I.

STATEMENT OF THE CASE.

On the 29th of May, 1889, the defendants, Clark Brewer, Ben Featherstone and James Bardinelli, were indicted in the Circuit Court of the United States for the Western District of Tennessee, at Memphis, for unlawfully neglecting to perform their duties in regard to an election, of which the two first were judges and the last named the returning officer, held on the 6th day of November, 1888, in the City of Memphis, Shelby County, Tennessee, for a Representative in Congress of the United States, for the Tenth Congressional District of that State.

There are three counts in the indictment. The first charges the defendants with an unlawful neglect to perform their duty as judges and officers of the election, as required by the laws of the State of Tennessee; the second, with unlawfully refusing to per-

form their duties in regard to the said election as required of them; and the third, with unlawfully violating the duty imposed upon them in regard to the election.

A demurrer was filed to the indictment on the 4th of December, 1889, and after argument before the Hon. Howell E. Jackson, Circuit Judge, and E. S. Hammond, District Judge, the judges being divided in opinion on the points raised by the demurrer, directed the said points in question to be certified to this court for its decision thereon.

The indictment is framed under Section 5515 of the Revised Statutes of the United States. The specific act of omission charged as constituting a crime within that statute, is a failing of the first two named defendants as judges, and the last named as the returning officer holding the election, when it was finished, after the polls were closed, then and there, at the southeast corner of Gayoso and Second streets, Memphis, that being the polling place of the Fourth Ward of Memphis, to open the ballot box, and there in the presence of such electors as chose to attend, to count the votes by reading aloud the names of the persons whose names appear in each ballot.

II.

The questions certified involve the point whether or not the election officers are required by the laws of the State of Tennessee to count the ballots at the exact spot where the election is held. That they are, is the contention of the government, and was the opinion of the learned district judge in a former trial of these same defendants and another; wherein he said that if election officers undertook to count the ballots in an unlawful manner against the laws of the State, as by removing the ballot box from the place designated for holding the election, they were guilty of a crime under the above section of the Revised Statutes.

III.

ARGUMENT.

The object of the Statute under which these defendants are indicted was stated in U. S. vs. Jackson, 25 Fed. Rep. 548, and restated by Justice Harlan in Re McCoy, 31 Fed. Rep. 794, as follows: "Congress seeks by this statute to guard the election of members of Congress against any possible unfairness, by compelling, under its pains and penalties, every one concerned in holding the election to a strict and scrupulous observance of every duty devolved upon him while so engaged. The evil intent consists in disobedience to the law. The Legislature has the power to adjudge, and does adjudge, that the doing of the thing is not for the public good, and whether its judgment be wise or unwise, it is always binding on the citizens, and the doing of it is a crime. This is particularly so with reference to that class of statutes imposing duties on public officials in the exercise of their public functions. The command of the legislative will must be obeyed, and disobedience is a crime and may be punished as such."

To test the sufficiency of this indictment, it is necessary to examine the duties imposed upon election officers by the laws of Tennessee.

The indictment presents no crime or offense under them if it was a sufficient compliance with the statute, to count the votes in the manner they were required by the law to be counted, elsewhere than at the very place where the votes were received.

The duty alleged to have been violated is prescribed by the Tennessee Code, Section 861, as follows: "When the election is finished, the returning officer and judges, in the presence of such of the electors as may choose to attend, shall open the box and read aloud the names of the persons which shall appear in each

ballot, and the clerks at the same time shall number the ballot, each clerk separately."

Code, Sec. 861, Ch. 2, Art. VII.

This section is literally taken from Section 3 of Chapter 9 of the Session Acts of 1796. Appendix I.

Until the passage of the Session Acts of 1821, Chapter 27, there was no provision made by law for the designation of places of holding elections in the various Civil Districts into which the Counties of Tennessee were sub-divided.

That act provided that "the places of holding in each Civil District be at some convenient locality, to be designated by the County Court at least six months before the election, and entered of record."

Tennessee Code, Sec. 837.

Afterward Chapter 3 of the Session Acts of 1837 declared the courthouse of the county is always a place of voting, although other places may be established in the Civil District in which the courthouse is situated.

Code, 838.

Prior to the passage of the last cited act, the General Assembly of Tennessee had provided for laying off the counties of the State into Civil Districts, by Chapter 1 of the Session Acts of 1835. The 4th Section of the Act reads thus:

"The Commissioners aforesaid shall, at the time of laying off said Districts, designate a suitable place, as near the center of each District as practicable, for the purpose of holding elections for the election of the officers aforesaid, and other county officers, and which shall continue to be the place for holding elections in said Dis ricts until altered or removed by a majority of the qualified voters residing therein."

The places thus provided were known as "District Election Fields."

Caruthers vs. Nicholson.

At the session of 1841, the General Assembly of the State passed on December 29th, Chapter 31, "an Act to suppress illegal voting." Therein was declared the duty of every officer holding an election, and the duty of the judges of every election. The Act is printed Appendix No. 2, and need only be referred to for the purpose of ascertaining that it neither in express terms nor by implication, made it the duty of the officers of election to count the votes at the place where the election is held.

The 20th Section of the Act reads as follows: "That the officers and judges appointed to hold any election in this State shall not proceed to or commence counting out the votes given in at said election, until the polls have been closed."

The argument that the defendants violated their duty by not counting the votes at the polling place is predicated of the construction put upon the election laws by Hammond, District Judge, in the United States vs. Bardinelli, 37 Fed. Rep. 140. The learned Judge said:

"As was well remarked by one of the learned counsel for the defendants, our election laws constitute as a whole, a scheme for the regulation of the proceeding intended to secure to the people a free, fair and honest election, to facilitate the right to vote, and preserve the purity of the ballot-box; and they must, in construing any part of them, be examined as a whole. As arranged in the sections of the Code of 1858, they will be found to be broken up somewhat, and disarranged from their original contexts, and, when restored, their meaning is often made more clear. They are found in Chapter 2 of Article vi of that Code pertaining to "Officers and Elections," the original basis being Chapter 9 of the Acts of 1796,

passed at the first session of the General Assembly of the State, from which the Section in controversy here was taken.

Code, 1858, Secs. 812–887.
Thompson & S. Code, Secs. 812–887.
Mill. & V. Code, Secs. 1003–1096.

There cannot be the least doubt upon reading them that the intention is to provide for a perfectly open and public counting of the vote of each precinct at the place in that precinct where the election is held. The County Court is required to designate such places for each precinct at least six months before the election, and to enter the designations of record.

Act 1827, C. 27 Sec. 1.
Code 1858, Secs. 837–837a.
Thomp. & S. Code, Sec. 837 et seq.
Mill. & V. Code, Secs. 1041–1043.

Then come the provisions for counting the vote and making the returns, with which we have to deal here, among the sections regulating "the proceedings after the polls are closed," which classifications, titles and sub-titles are a part of the original Code itself. From the whole scheme it is apparent that the counting must take place at the polling place, and can be had nowhere else without violating the duties imposed by these laws, and "in the presence of such of the electors as may choose to attend."

Code, 1858, Art. 7, Secs. 846–863a.
Id. Art. 8, Secs. 864–871.
Id. Art. 9, Secs. 872–887.
Thomp. & S. Code, Secs. 846–887.
Mill. & V. Code, Secs. 1053–1096.

It is to be observed that by no Act of the Legislature of Tennessee or by construction given by its courts from 1796 to the finding of the indictments against these defendants, has it been de-

clared the duty of the officers of election to count the votes "at the place in that precinct where the election is held."

From the whole body of the election laws it is apparent that it was never contemplated that the counting must take place at the polling places. Election fields are designated; the places of holding elections in each Civil District required to be designated; duties charged upon the officers and judges of election in plain terms; but nowhere is it said that the counting of the votes after the polls are closed, shall be at the polls or at any other designated point. The Legislature from time to time has endeavored to provide a system of election laws to preserve the purity of the election from its inception to the conclusion, to insure to every voter a free and unobstructed right to cast his ballot, and to secure an honest return and count of those ballots. The preservation of the poll list and a comparison of the polls after the election is provided for and it is required that the sheriff or officer holding the election for Presidential Electors and State and County officers and members of Congress, be made by the officer holding the election, at the Courthouse of the county, on the first Monday after the election.

Elections for members of Congress in Tennessee are to be held at the different places in the cities and counties provided by law, and according to the existing laws governing the elections in the State, so far as applicable. The returning officers are required to make their returns in the manner and to the persons provided by law. The only specific place which is designated for the person holding any election to compare the polls and count the votes in comparing the polls, is the county Courthouse, which is the place designated by the 5th Section of Chapter 2 of the Act of 1835, where it is made the duty of the officer to compare the polls on the designated day.

In the case of McGraw vs. Haroldson, which was a contest about the validity of the election for Tax-Collector of Obion County,

Tennessee, it was objected, among other things, to the validity of that election; that the officers holding it did not compare the polls at the Courthouse, but counted the votes in a private house in the town in which the Courthouse was situated. Considering the point, the Supreme Court, speaking by Judge Milliken, said: "There is nothing in this exception. The Code, Section 864, requires the officer or person holding every election of county officers to compare the polls at the Courthouse. In this case the agreed facts show that the returns were made to the Courthouse, but the County Court being in session, the "votes were counted in a private house "in the town. This was a sufficient compliance with the require- "ments of the statute, and constitutes no ground in the absence of "all fraud or misconduct in comparing the polls and counting the "votes, for setting aside the election."

44 Tenn., 44-45.

If it be a sufficient compliance with the statute requiring that the polls shall be compared at the Courthouse, to compare the polls and count the votes at a private house, how it is possible to make it a criminal offense not to count the votes at the polls and at the very place where the ballots were cast by construction of the election laws of Tennessee, we have never been able to appreciate.

The learned District Judge did not reach that conclusion after his elaborate examination of all the statutes, from any words which he found in those statutes, but from his conception that as nowhere else was provided, and the clause requiring the votes to be counted after the election was finished, was contained in the 3d Section of the Act of 1796, which referred to the manner of voting, that it necessarily followed that at the place where this voting was done, after the election was finished, the returning officer and inspectors were required, in the presence of such of the electors as chose to attend, to open the box and read aloud the names of the persons from the tickets. The District Judge seemed to overlook the sub-

sequent paragraph in that Section, which reads thus: "And when "the tickets are numbered, the person having the largest number "of ballots shall be declared elected, but where two persons shall "have an equal number of votes, the returning officer shall have "the casting vote."

When the Act of 1796 was framed, it was not contemplated that there should be more than one voting precinct, and that evidently was the Courthouse. As the State became more populous, voting precincts were provided for the convenience of the voters, but the duty of the election officers, after the election was finished, to open the box and count the votes, remains to-day as it was declared to be by the original Act. It has never been altered or modified in any particular whatever.

In Re McCoy, this court speaking by the late Justice Mller, said: "While the Federal Government has not thought it advisable to provide for separate elections for Congressmen, nor to interfere with the general laws for the conduct of those elections passed by the States, it has enacted the sections above referred to, and among others those for the punishment of persons who violate the election laws at an election where votes are cast for a member of Congress. In doing this they have adopted the laws of the State, and they have provided that persons who violate them at such an election—that is, where a member is voted for—shall be punished by the provisions of the statutes of the United States and by proceedings in the Federal Courts."

Giving to the Tennessee Act, in expounding it, the plain meaning of its words, and declaring the evident intention of the Legislature, it is apparent that these defendants are not charged with a crime.

It was said by this Court, Chief Justice Marshall delivering its opinion, in the United States vs. Wiltberger, 5 Wheaton 95, "that

"though penal laws are to be construed strictly, they are not to be "construed so strictly as to defeat the obvious intention of the Legis- "lature. The maxim is not to be so applied as to narrow the words "of the statute to the exclusion of cases which those words, in their "ordinary acceptation, or in that sense in which the Legislature had "obviously used them, would not comprehend."

And again, in the United States against Morris, 14 Peters, 475, Chief Justice Taney speaking for the Court, that "in expounding "a penal statute the court will certainly not extend it beyond the "plain meaning of its words, for it has long been well settled that "such statutes must be construed strictly, yet the evident intention "of the Legislature ought not to be defeated by a forced and over "strict construction."

And again, this Court, Mr. Justice Swayne delivering its opinion, in the United States vs. Harwell, 6 Wallace, 395 and 396, said: "We are not unmindful that penal laws are to be construed strictly. It is said that this rule is almost as old as construction itself. But whenever invoked it comes attended with qualifications and other rules no less important. It is by the light which each contributes that the judgment of the court is to be made up. The object in construing penal, as well as other statutes, is to ascertain the legislative intent. That constitutes the law. If the language be clear it is conclusive. There can be no construction where there is nothing to construe. The words must not be narrowed to the exclusion of what the Legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt on the subject. It must not be defeated by a forced and over-strict construction. The rule does not exclude the application of common sense to the terms made use of in the Act in order to avoid an absurdity, which the Legislature ought not to be presumed to have intended. When the words are general and include various classes of persons, there

is no authority which would justify a court in restricting them to one class and excluding others, where the purpose of the statute is alike applicable to all. The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the Legislature. The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such sense, but neither one way nor the other, as will best manifest the legislative intent."

Applying these rules of construction above to the provision of the Tennessee law, we find that its language is that the ballot-box shall be opened and the votes counted, and in the presence of such electors as may choose to attend. Looking to the language alone, used by the legislative branch of the government, in order to express its meaning, it is to be observed that the duty of counting the votes is charged upon the officers of the election, in the presence of such of the electors as choose to attend—that is, as chose to go with or accompany the officers of the election. If the intention was that the count should be only at the polling place, it was not expressed by the transitive verb to attend, for its meaning is "to go with or accompany." Again, if the object of these laws is to insure the purity of an election, that which was directed to secure the fair count and honest return of the votes as counted, was not the counting at the particular place, but a public counting after the polls were closed, and only after the polls were closed, and the election finished, of the votes in the manner prescribed by the statute, and in the presence of the attending electors.

In considering this question, it is proper to look at the condition of Tennessee when the original Act of 1796 was passed. The census had been taken the previous year, and showed that there

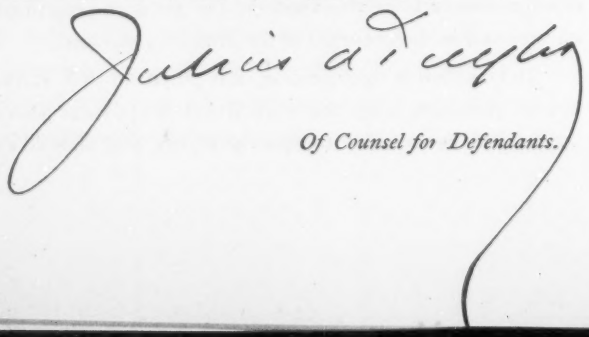
were 77,263 persons in the State, of which 36,123 were white males. The State had just been admitted into the Union; Shelby County, in which Memphis is situated, had not been organized. Its first Courthouse was not constructed until August, 1821. Prior to that time the courts were held frequently at private houses, and all legal documents issued by the courts or officials, were dated from the Chickasaw Bluffs.

Keating's History of Memphis, p. 132.

The elections were held in a most primitive way, and yet, at this very early day, the spirit existed in Tennessee, which has continued from its earliest settlement up to the present time, that its elections should be fairly held and the votes cast honestly counted. Therefore the provision was made for the attendance of the electors, the obvious and only purpose being that in the presence of the electors the counting should be done, and not that it should be done at a particular place and only at a particular place.

The State has kept pace with the most advanced thought, with the most advanced legislation, to insure the purity of the ballot; early adopted the Australian system of voting, and by a wise provision, required the judges of election to be appointed from different political parties, (Code of Tenn. Mill. & V. Sec. 1048), but if its laws are to be interpreted as construed by Hammond, District Judge, we have the anomalous condition of a crime committed, in a case where the Federal Supervisor for the Republican party, who helped to do the counting, the only witness examined at all, distinctly swears that the counting was fairly done, and the Circuit Judge is of opinion that it was a lawful place to do the counting.

The statutes are surely not pitfalls with which it is hoped to catch unoffending election officers and punish them.



Of Counsel for Defendants.

APPENDIX 1.

ELECTIONS.

CONSTITUTION, ART. I, SEC. 5. ART. II, SEC. 7. ART. IV, SEC. 1, 2, 3, 4.

MARCH, 1796—CHAPTER 9.

SECTION 1. The county courts respectively, at the session next preceding the day of the election, in every two years, shall appoint three inspectors to superintend the election; and if it shall at any time happen, that any county court shall fail to make such appointment, or any person so appointed shall refuse to serve, the sheriff, with the advice of three justices of the peace, or if none shall be present, three respectable freeholders, shall, before the beginning of such election, appoint inspectors for the purpose aforesaid; and every inspector who shall be appointed by either of the ways aforesaid, and serving pursuant to such appointments, shall be held and deemed lawful inspectors at such elections.

SEC. 2. The sheriffs or returning officers shall, on the day and at the place for holding each respective election, be provided with one box for receiving the ballots for governor and members of the General Assembly: The returning officer or his deputy, shall receive the tickets in presence of the inspectors, and put each ticket into the box, which box shall be locked or otherwise well secured, until the election shall be finished.

SEC. 3. Every person qualified to vote in manner directed by the constitution, who shall attend for that purpose at any election, shall give to the returning officer, in the presence of the inspectors, a ticket

or scroll of paper, which ticket shall be put in the box in manner before directed; and at the same time the clerks of the said election shall take down, on separate lists, the name of every person voting, and when the election shall be finished, the returning officer and inspectors, shall in the presence of such electors as may choose to attend, open the box, and read aloud the names of the persons which shall appear in each ticket, and the clerks at the same time shall number the ballots, each clerk separately. If there shall be two tickets rolled up together or if any ticket shall contain the names of more persons than such elector has a right to vote for, in either of these cases, such ticket shall not be numbered in taking the ballots, but shall be adjudged void. And when all the tickets are numbered the person having the greatest number of ballots shall be declared duly elected; but where two persons shall have an equal number of votes, the returning officer shall have the casting vote.

SEC. 4. The governor shall be ballotted for in each and every county, at the time and places that members for the General Assembly are elected for such county, and the ballots shall be received by the sheriff or other returning officer, in presence of the inspectors of the poll under the same rules and regulations as are prescribed by this act for the election of members for the General Assembly.

SEC. 5. Every election hereafter to be made by virtue of any writ from the governor, shall be conducted and regulated in the same manner as by this act prescribed, so far as the particular case can be applied to the general rules.

SEC. 7. If any person shall vote at an election, who by law shall not be entitled to vote at such election, he shall forfeit and pay the sum of ten dollars, to be recovered with costs, by action of debt, in any jurisdiction having cognizance thereof, one half to the use of the county, and the other half to him or them who will sue for the same. And where any suit shall be brought against any person for

voting as aforesaid, without having a right to such vote, the proof shall be upon the plaintiff.

SEC. 9. The sheriff or coroner, within ten days after every election, shall at the request of any person elected to serve in the General Assembly, or other persons in his behalf, cause fair copies of the lists of votes, and the number of ballots for each candidate to be made out and delivered to the person requesting the same, or to his order, which lists and numbers shall be signed by the returning officer; and if any officer should refuse so to do, or shall hold elections in any other manner than is by this act directed, or shall neglect or refuse to make returns of the elections by him to be held, the officer so offending shall forfeit and pay the sum of seven hundred and fifty dollars, to be recovered by action of debt in any court of record having cognizance thereof, with costs, one-half to to the use of the State, and the other half to such person as will sue for the same.

APPENDIX 2.

STATUTE LAWS OF THE STATE OF TENNESSEE.

CHAPTER 31.

An Act to suppress illegal voting. [Passed Dec. 29, 1841.]

SECTION 1. That if any person shall knowingly vote at any election that shall be held for president, vice-president, members of congress, members of the state legislature, sheriff, clerk of the circuit court, clerks of the county court, register, county trustee, justice of the peace, constable, or for any one or more of said officers, or at any election that shall be held under the Constitution and laws of this State, such person not being at the time a qualified voter of the county in which he so votes, shall be adjudged guilty of a misdemeanor, and upon conviction upon indictment or presentment in any court having jurisdiction thereof, be punished as in other cases of misdemeanor.

SEC. 2. That if any person shall knowingly vote in any election for justices of the peace and constables, or either of them, or in any election in which the voters of a civil district, or portions of the voters of any county only are entitled to vote, such person not being a qualified voter of such civil district or portion of the county in which he so votes, shall be guilty of a misdemeanor, and upon conviction shall be punished as in other cases ofmisdemeanor.

SEC. 3. That if any person shall vote more than once in the same election, either in the same or different counties or civil districts, such person shall be adjudged guilty of a misdemeanor, and upon conviction be punished as in other cases of misdemeanors.

SEC. 4. That if any person shall vote under any assumed or fictitious name, whether such person be a qualified voter or not, such person shall be adjudged guilty of a misdemeanor, and upon conviction, be punished as in other cases of misdemeanors.

SEC. 5. That it shall be the duty of every officer holding any election, or some justice of the peace, before opening the polls, first to administer to the judges appointed to hold such election, the following oath or affirmation: "You do solemnly swear (or affirm, as the case may be) that as judges of this election you will suffer no one to vote whom you may know of your own knowledge, or who may appear either by his own oath, or by the testimony of others, not to be a qualified voter; that you will not suffer the *ballot box* to be out of your presence and sight, unless it be left in the immediate care of one of your fellow judges, until every vote is counted out, and that you will faithfully and impartially conduct yourselves as judges of this election, and you will in all respects perform the duties imposed upon you by the law as judges and inspectors of the election—SO HELP YOU GOD."

SEC. 6. That all judges presiding at elections, and all officers holding elections, or any justice of the peace, when so directed by said judges, or a majority of them, shall be authorized to administer oaths to ascertain the qualification or right of any person who may offer to vote at any election, and if any person shall offer to vote, and none of the judges know that he is a qualified voter, or if his vote shall be objected to by any candidate or other citizen of this State, it shall be the duty of the judges of such election or some one of them, or the officer holding such election under the direction of the judges, or a majority of them, to administer an oath or affirmation in the following form or to the following effect: "You do solemnly swear (or affirm, as the case may be) that you will true answers make to such questions as may be asked you touching your qualification or right to vote in the present election—SO HELP

YOU GOD." The judges or some one of them, shall then ask the person offering to vote the following questions: "Are you a citizen of the State of Tennessee?" "Are you twenty-one years of age?" "Do you reside in this county?" "Has your home been in this county six months next before this day (the day of holding the election) "Have you voted at any other time or place in this election?" which questions being asked and answered, and any other that the judges may think material to ascertain the qualification of the person offering to vote; if the judges, or a majority of them, are satisfied that such person is a citizen of this State, that he has attained the age of twenty-one years; that he has had his home in the county in which he may offer to vote six months next preceding the day before such election, and that he resides therein, and that he has not voted before at the same election, and that he is otherwise a qualified voter, the judges shall thereupon receive his vote, but before they receive his vote, if they or any one of them shall have reason to suspect that the person offering to vote has sworn falsely, they, or the officer, or some justice of the peace under their direction, may swear any by-stander as to the right and qualification of such person to vote, and in all elections for justices of the peace and constables, or any other election in which a civil district or a portion of the voters of any county only are entitled to vote, the judges of such election shall be satisfied that the party offering to vote is a qualified voter, not only of the county, but of the civil district or such portion of the county in which he may offer to vote, and said judges shall have power to investigate him on oath accordingly.

SEC. 7. That in any of the foregoing cases, where an oath or affirmation shall be administered, if any person to whom an oath or affirmation has been administered, shall swear or affirm, knowingly, wilfully and falsely, to a fact material to the point in question, such person shall be deemed guilty of perjury, and upon conviction on

indictment, or presentment in any court having jurisdiction thereof, be punished as in other cases of perjury.

SEC. 8. That if any officer holding an election, shall fail, neglect or refuse to administer the oaths, or any one of them required by this act, such officer shall be deemed guilty of a misdemeanor, and shall, upon conviction, be punished as in other cases of misdemeanors.

SEC. 9. That if any officer, appointed to hold an election, shall set aside the judges, or any one of them regularly appointed to preside at such election, or shall fail or refuse to administer the oath required by the fifth section of this act, they being there present, willing, and not incompetent to serve as judges of such election, such officer shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be punished as in other cases of misdemeanors.

SEC. 10. That it shall be the duty of the judges at every election, to preserve the poll books, or list of the names of the voters, which shall be kept by their respective clerks, which shall be certified by the judges, or a majority of them, under their hands, to contain a true list of the voters at their respective places of holding elections, which certificate shall be attested by the clerks and officers holding the elections, and the judges shall, within ten days after said election, cause one copy or set of them to be filed with the clerk of the circuit court, and another copy with the clerk of the county court of the county in which such election shall be held, and such books, or lists, or copies thereof, certified by the clerk who shall have custody of the same, shall be considered records, and be received as evidence in any case arising under this act, subject to be impeached by other testimony, and if the judges aforesaid shall fail to return the poll books or lists of voters, or copies thereof, certified as aforesaid, the same may be proved by other creditable testimony, and received as evidence in any case arising under this act.

SEC. 11. That the clerks of the different elections shall also take the following oath: "You do solemnly swear or affirm (as the case may be) that you will faithfully, truly and impartially discharge your duty as clerks of this election—SO HELP YOU GOD;" which oath shall be administered by the person administering the oath of office to the judges and inspectors of the election, or by one of the judges themselves, and it shall be the duty of the clerks at elections to keep a fair list or book of the names of the voters voting at such election, and shall attest the correctness thereof, under their hands, as provided in the preceding section of this act.

SEC. 12. That if any of the judges aforesaid, clerks at elections, or officer holding the same, shall violate any of the provisions in the tenth and eleventh sections of this act, or any other provisions of this act, he or they shall be guilty of a misdemeanor, and upon conviction, shall be punished accordingly.

SEC. 13. That if any person shall fraudulently or unlawfully take any ticket out of the *ballot box* after the same shall be received, or shall fraudulently or unlawfully put any ticket into the ballot box, such person shall be guilty of a misdemeanor, and shall, upon conviction, be punished as in other cases of misdemeanors.

SEC. 14. That it shall be the duty of the judges of this State to give this act in charge to their respective grand juries, whose duty it shall be to present all such offences against this act, as may come within their knowledge; and it shall be the duty of all grand juries to make dilligent enquiry concerning all offences committed in violation of this act, and when they shall have a well grounded belief that such offence or offences have been committed by any person or persons within their counties, they shall have full power, and it is moreover hereby made their duty, to apply for a *subpœna* or *subpœnas* for the judges or inspectors, clerks or officers holding such elections, or any one of them, as a witness or witnesses, whom they may believe to have any knowledge of such offence or offences, and

such witness or witnesses, when he or they shall regularly appear before the grand jury, shall give evidence of such offence or offences in violation of this act, as may be known by him or them, or any knowledge they may have in relation thereto, and it shall be the duty of all judges and inspectors of elections, to give information of, and prosecute or cause to be prosecuted, and bring to punishment, all persons who may be guilty of a violation of this act, and no prosecutor shall be necessary on any indictment under this act, and when any person without his own contrivance or procurement, shall be sent as a witness to give evidence, and is examined before any grand jury in this State, against any person or persons for offences under this act, it shall not be lawful for the person or persons against whom such evidence shall have been given, to be thereafter summoned or used as a witness before any grand jury or petit jury in order to give evidence against any such witnesses, when on trial for any offense under this act, committed previous to the time of his being used as a witness as aforesaid.

SEC. 15. That when any person who is not a native born citizen of the United States, shall offer to vote, and his vote is objected to, he shall produce a certified copy of the record of his naturalization, which record shall show that the person has been declared by a competent court, a citizen of the United States, if the same is in his possession, or, if not, then he may be examined as to his naturalization, and if the Judges shall be satisfied from his examination, and other oral testimony, (if any is offered,) that the party offering to vote is naturalized, they shall receive his vote accordingly. In like manner, the party offering to vote, may be examined as to his naturalization where he produces the copy of the record of his naturalization, and the same is objected to on account of authentication.

SEC. 16. That the vote of no person shall be received out of the county in which he may reside, but if any person shall go out

of the county for a definite purpose, not intending to change his home, and shall return on or before the day of election, he shall be considered a resident citizen of the county, and shall be entitled to vote, and where any citizen has a fixed residence in a county, the same shall continue to be his residence until he shall change the same to some other county or State.

SEC. 17. That whoever shall bet on any election in this State, shall be guilty of a misdemeanor, and may be indicted or presented therefor, under the provisions of this act, and on conviction, be punished as in other cases of misdemeanors: *Provided*, That all prosecutions under this section, shall be instituted within six months after the termination of the election upon which the bet may have been made, and not afterwards.

SEC. 18. That the 7th section of this act of 1796, chapter 9, be, and the same is hereby repealed, and all laws coming within the perview of this act, are hereby repealed.

SEC. 19. That if any person or persons should be found guilty of aiding in the bringing, or cause to come or to be brought, fraudulent voters into the State, for the purpose of practicing a fraud upon the elective franchise, such person or persons so found guilty, in any court having cognizance thereof, shall be sentenced to undergo confinement in the penitentiary of this State, for a term of time not less than two, nor more than five years.

SEC. 20. That the officer and judges appointed to hold any election in this State, shall not precede to or commence counting out the votes given in at said election, until the polls shall have been closed.

APPENDIX 3.

CHAPTER XVII.

An Act to Provide for the Election of Electors of President and Vice-President of the United States.

SECTION 1. Be it enacted by the General Assembly of the State of Tennessee, That this State shall be divided into eleven electoral districts for the purpose of electing Electors of President and Vice-President of the United States.

SEC. 2. Be it enacted, That the first district shall be composed of the counties of Carter, Sullivan, Hawkins, Washington and Greene, and shall elect one elector.

That the second district shall be composed of the counties of Cocke, Sevier, Jefferson, Grainger, Claiborne and Campbell, and shall elect one elector.

That the third district shall be composed of the counties of Blount, Knox, Anderson, Morgan and Roane, and shall elect one elector.

That the fourth district shall be composed of the counties of Rhea, Bledsoe, Marion, Hamilton, McMinn and Monroe, and shall elect one elector.

That the fifth district shall be composed of the counties of Franklin, Warren, White, Overton, Fentress and Jackson, and shall elect one elector.

That the sixth district shall be composed of the counties of Smith, Sumner and Wilson, and shall elect one elector.

That the seventh district shall be composed of the counties of Rutherford, Davidson and Williamson, and shall elect one elector.

That the eighth district shall be composed of the counties of Lincoln, Giles, Lawrence, Hardin and Wayne, and shall elect one elector.

That the ninth district shall be composed of the counties of Bedford, Maury and Hickman, and shall elect one elector.

That the tenth district shall be composed of the counties of Robertson, Montgomery, Dickson, Stewart, Humphreys and Perry, and shall elect one elector.

That the eleventh district shall be composed of the counties of Henry, Weakley, Obion, Carroll, Gibson, Dyer, Henderson, Madison, Haywood, Tipton, McNairy, Hardeman, Fayette and Shelby, and shall elect one elector.

SEC. 3. Be it enacted, That the election for the said electors shall be and take place on the second Thursday and Friday in November in the year one thousand eight hundred and twenty-eight, in each and every county in this State, and shall be held at the same places in each and every county when by law elections are held in the same for members of the General Assembly.

SEC. 4. Be it enacted, That the Sheriffs in each and every county in this State shall advertise in each captain's company and also at the court house in said county, in which he shall give at least ten days notice of the time and places, where he will by virtue of this Act proceed by himself or his deputy, as the case may be, to hold said elections for the purpose heretofore recited.

SEC. 5. Be it enacted, That it shall be the duty of the Sheriff of each and every county to summon at least five days before the day of election aforesaid, three respectable freeholders in his county to preside as judges of the said election at each place where by law elections are held in the county, who shall previous to their acting as such take an oath to conduct said election according to law without favor, partiality or affection, allowing none to vote at said election but such as would be entitled to vote for members of the General Assembly.

SEC. 6. Be it enacted, That said judges of elections or a majority of them shall make out and sign a certificate, stating the number of votes each person voted for may have received, which shall be by them delivered to the sheriff or other returning officer of the county.

SEC. 7. Be it enacted, That the Sheriffs or other returning officers of the counties composing the first district shall meet at Jonesboro: That the sheriffs or other returning officers of the counties composing the second district shall meet at Rutledge: That the sheriffs or other returning officers of the counties composing the third district shall meet at Knoxville: That the sheriffs or other returning officers of the counties composing the fourth district shall meet at Washington in Rhea county: That the sheriffs or returning officers of the counties composing the fifth district shall meet at Sparta: That the sheriffs or other returning officers of the counties composing the sixth district shall meet at Hartsville, Sumner county: That the sheriffs or other returning officers of the counties composing the seventh district shall meet at the house of Bailey Hardeman in Williamson county: That the sheriffs or other returning officers of the counties composing the eighth district shall meet at Lawrenceburg: That the sheriffs or other returning officers of the counties composing the ninth district shall meet at Columbia: That the sheriffs or other returning officers of the counties composing the tenth district shall meet at Charlotte: That the sheriffs or other returning officers of the counties composing the eleventh district shall meet at Jackson, Madison county, for the purpose of comparing the polls of their respective districts; which meeting of the sheriffs or returning officers aforesaid shall be on the Thursday succeeding the days of holding the aforesaid elections; and when the polls of the elections of the respective districts, shall be by the officers aforesaid compared, they shall immediately make out and deliver a certificate of election to the persons who shall have the highest number of votes in their respective districts.

SEC. 8. Be it enacted, That each of the electors who may be elected by virtue of this Act shall convene at the seat of Govern-